FILED

No. 97 676 OCT 16 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

DEBRA J. FORD,

Petitioner,

vs.

EDGAR LAWRENCE, in his official capacity as the Executive Director of Plumbers & Gas Fitters Examining Board and in his individual capacity; LEWIS MOORE, in his official capacity as Chairman of the Plumbers & Gas Fitters Examining Board and in his individual capacity; MICKEY DRUMMOND, in his official capacity as vice-chairman of the Plumbers & Gas Fitters Examining Board; GERALD SMITH, in his official capacity as Secretary of the Plumbers & Gas Fitters Examining Board; JOHN RILEY, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board; DANNY PRICE, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board; DAVID LECROY, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board; FRED PALMER, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

BYRON R. PERKINS
REBECCA J. ANTHONY
Counsel of Record
GORDON, SILBERMAN, WIGGINS & CHILDS
Attorneys for Petitioner
1400 Southtrust Tower
Birmingham, Alabama 35203-3204
(205) 328-0640

72216 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

51 pp

QUESTIONS PRESENTED

1. Can a State official disrupt the efficient functioning of his office, thus tipping the *Pickering* balance in favor of the State as employer, based on the official's unlawful retaliatory response to an employee's speech on a matter of public concern?

2. Is the law clearly established, despite the lack of factually identical precedent, that a state official may not fire an employee for writing an anonymous letter accusing the official of misuse of state funds?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinion Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provision Involved	1
Statement of the Case	2
A. The Underlying Action	2
B. Proceedings Below	6
Reasons for Granting the Writ	7
I. Can A State Official Disrupt The Efficient Functioning Of His Office, Thus Tipping The *Pickering* Balance In Favor Of The State As Employer, Based On The Official's Unlawful Retaliatory Response To An Employee's Speech On A Matter Of Public Concern?	7
II. Is The Law Clearly Established, Despite The Lack Of Factually Identical Precedent, That A State Official May Not Fire An Employee For Writing An Anonymous Letter Accusing The Official Of Misuse Of State Funds?	14
Conclusion	24

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Anderson v. Creighton, 483 U.S. 635 (1987) 22

Bell v. Wolfish, 441 U.S. 520 (1979) 18

Bryson v. City of Waycross, 888 F.2d 1562 (11th Cir. 1989) 13

Connick v. Myers, 461 U.S. 138 (1983) 7, 9, 10, 12

Cooper v. Smith, 89 F.3d 761 (11th Cir. 1996) 15

Dolhite v. Maughon, 74 F.3d 1027 (11th Cir.), *cert. denied*, 117 S. Ct. 185 (1996) 16

Eberhardt v. O'Malley, 17 F.3d 1023 (7th Cir. 1994) .. 23

Fikes v. City of Daphne, 79 F.3d 1079 (11th Cir. 1996) 10, 11

Foy v. Holston, 94 F.3d 1528 (11th Cir. 1996) 15

Givhan v. Western Consolidated School District, 439 U.S. 410 (1979) 10, 11

Hansen v. Soldenwagner, 19 F.3d 573 (11th Cir. 1994) 15

Contents

Page

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 14, 15, 16

Lassiter v. Alabama A & M University Board of Trustees, 28 F.3d 1146 (11th Cir. 1994) 17

McIntyre v. Ohio Elections Commission, 115 S. Ct. 1511 (1995) 11

McMillian v. Johnson, 88 F.3d 1554, *amended*, 101 F.3d 1363 (11th Cir. 1996) 17, 18

Morales v. Stierheim, 848 F.2d 1145 (11th Cir. 1988), *cert. denied sub nom, Leon v. Avino*, 489 U.S. 1013 (1989) 10

Picker International, Inc. v. Parten, 935 F.2d 257 (11th Cir. 1991) 22

Pickering v. Board of Education, 391 U.S. 563 (1968) ..... i, 6, 7, 9, 15, 23

Pierson v. Ray, 386 U.S. 547 (1967) 16

Porter v. Califano, 592 F.2d 770 (5th Cir. 1979) 12, 13

Rankin v. McPherson, 483 U.S. 378 (1987) 9, 10

Scheuer v. Rhodes, 416 U.S. 232 (1974) 16

Suissa v. Fulton County, 74 F.3d 266 (11th Cir. 1996) . 17

Contents

Page

United States v. Lanier, 117 S. Ct. 1219 (1997) 19, 20, 22

Wilson v. Layne, 110 F.3d 1071 (4th Cir. 1997) 19

Zarek v. Fredericks, 138 F.2d 689 (3d Cir. 1943) 19

Statutes Cited:

18 U.S.C. § 242 19

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 7

42 U.S.C. § 1983 1

Ala. Code § 36-25-5 3

United States Constitution Cited:

First Amendment 1, 6, 12, 13, 23

Other Authority Cited:

Qualified Immunity for Civil Rights Violations: Refining the Standard, 75 Cornell L. Rev. 462 (1990) 16

Contents

Page

APPENDIX

Appendix A — Final Judgment And Memorandum Opinion Of The United States District Court For The Northern District Of Alabama, Southern Division Entered August 28, 1996 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Filed July 18, 1997 ..... 16a

Debra J. Ford respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals (App. 16a) was not reported. The judgment and opinion of the lower court is unreported. (App. 1a).

STATEMENT OF JURISDICTION

The Eleventh Circuit released its decision on July 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Ford claims that the Respondents/Defendants violated her First Amendment right to free speech. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech.") This action was brought pursuant to 42 U.S.C. § 1983 (Supp. 1997); section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioner Debra J. Ford sued Respondents Edgar Lawrence, Lewis Moore, Mickey Drummond, Gerald Smith, John Riley, Danny Price, David Lecroy, and Fred Palmer (hereinafter, collectively, "Examining Board"), in their official capacities, in the district court for the Northern District of Alabama. Ford also sued Lawrence and Moore in their individual capacities; Moore was later dismissed in his individual capacity. The Complaint was filed on July 17, 1995.

A. The Underlying Action

Ford was employed as a clerk/typist at the Plumbers and Gas Fitters Examining Board, an agency of the State of Alabama. Exh. 38-Exh. 10-1. The Examining Board is governed by a Board of Directors, and the operations of the agency are administered by an Executive Director, Lawrence, appointed by the Board of Directors. Ford's duties included "answering the telephone, greeting people . . . when they came in, [r]enewing people's certifications, typing, filing, working on the computer." Exh. 38-33. She saw Lawrence if he was in the office. *Id.* at 37. The duties she performed for Lawrence included answering the telephone for him, handing him his mail, and other services — such as pulling files — when requested, which was seldom. *Id.* at 38-39. She filed compliance officers' reports and itineraries. *Id.* at 41-42. She also checked on individuals' certifications when requested by compliance officers. *Id.* at 39-42.

Ford stated that Lawrence was a "real good boss." *Id.* at 32. She testified that he did not mistreat the employees, and that she did not hold any ill will toward him. *Id.* at 32-33. Lawrence gave her good reviews. *Id.* at 33. Lawrence testified that, before Ford wrote the letter, he thought Ford was a good employee. Exh. 39-95.

During the Fall of 1994, David Wilcox, a compliance officer for the Examining Board, informed Ford that Lawrence was planning to use his state vehicle to carry his wife to and from South Alabama, where Lawrence's wife was planning to work in a restaurant. *See* Exh. 38-Exh. 3-1-2. This personal use of a state vehicle is a violation of state law. *See* Ala. Code § 36-25-5. At this same time, Lawrence had obtained a "cover" tag for his state vehicle. Exh. 39-27-29. A cover tag is a license plate that does not carry any indication that the vehicle is owned by the State; rather, such a tag resembles in all aspects a personal license plate. *See* Exh. 39-Exh. 10.

In response to what she perceived as a possible misuse of state funds, Ford wrote a letter, stating that Lawrence's use of a cover tag was suspicious. Exh. 38-56-59, 60, 64-65 & Exh. 1. The letter stated:

> Why is it that the Executive Director of the State of Alabama Plumbers and Gas Fitters Examining Board, Mr. Edgar Lawrence, is driving a 1994 Caprice automobile bought and paid for by that Agency without a State License Plate or any other markings on it to identify it as a State owned vehicle? This automobile is being driven around with a regular license plate on it. I think it very suspicious that Mr. Lawrence is the one who has this type of license plate on his vehicle when the Compliance Officers for this agency who actually go out in the field to investigate complaints do not have them also. It would appear that Mr. Lawrence has decided to use this vehicle for his own personal use instead of just for STATE OF ALABAMA *business* as it was intended for it to be used.

Ford signed the letter, "A Very Concerned Citizen." Exh. 39-35-48-49. Ford sent the letter anonymously because she "knew that if Mr. Lawrence knew right off the bat who had [written] it, that he would fire whoever wrote it." Exh. 38-72.

She sent this letter to four members of the Board: Fred Palmer, John Riley, David Lecroy, and Danny Price. *See* Exh. 38-Exh. 1. Ford and Wilcox had discussed that Price, a Board member whose term was nearing the end, might be helpful in investigating the matter. Exh. 38-61 and Exh. 38-Exh. 3-3. Ford gave the letter to her friend, Patsy Williams, and asked her to mail the letter. *Id.* at 69-72. She asked her to mail the letter from somewhere other than Jasper, Ford's home town. *Id.* at 71-72. Subsequently, Williams gave the letter to one of the truck drivers at her office and asked the driver to drop the letter in a mail box. The driver mailed the letters from Huntsville.

After he received the letter, Lecroy, one of the Board members, called Lawrence and sent him a copy of the letter. Exh. 39-35-36. Lawrence them contacted the other members of the Board. *Id.* at 36. According to Lawrence, no Board member questioned him about his personal use of his state vehicle. *Id.* at 68-71. Lawrence thought that the letter was from a "disgruntled" employee, although the letter was signed "A Very Concerned Citizen." *Id.* at 48-49.

When he received the letter, Lawrence began to seek the identity of the "disgruntled employee." *Id.* at 38. His suspicions fell on those employees working in or near Huntsville. *Id.* He looked at itineraries for the previous two weeks "to see who had been in Huntsville." *Id.* He claims that he asked every employee if they knew who wrote the letter, although he did not ask Ford if she had written the letter, and he did not show her the letter until the day she was terminated. *Id.* at 54-55, 62.

Lawrence showed the letter to the compliance officers working in South Alabama. *See* Exh. 42-55. A couple of weeks later, these compliance officers, Wilcox, Mike Leonhardi, and David Wilson, were in the Birmingham office discussing, among other things, the letter. *Id.* at 54-55; *see also* Exh. 38-Exh. 4. They repeatedly asked Ford if she knew who had written the letter; Ford told them that she had written the letter. Exh. 38-Exh. 4. She asked the officers not to tell Lawrence she had written the letter because he would fire her, and they agreed. *Id.* at 78-79 and Exh. 4. The compliance officers and Ford were generally in agreement that Lawrence would terminate or otherwise punish the person who had written the letter. *Id.* at 79; Exh. 42-72, 76-78.

Subsequently, Leonhardi and Lawrence were at a meeting in Montgomery and Lawrence asked Leonhardi who had written the letter. Exh. 39-46-50. Leonhardi told Lawrence that Ford had written the letter. Exh. 42-84. When Ford discovered that Leonhardi had told Lawrence she had written the letter, she confronted Leonhardi. Exh. 38-93 & Exh. 5. Leonhardi said that he knew had he promised not to tell Lawrence that Ford had written the letter, but Lawrence had asked him who had written the letter. *Id.* at 93-95 and Exh. 5. Leonhardi claims that Ford called him a "son-of-a bitch" and that this upset him because Ford was a woman. *Id.* at 91-93 ("I know it sounds bad. But yeah, for a woman to say that, yeah, it was shocking to me. . . . It would not shock me if a man said it as badly. [sic] I know that sounds sexist."). Ford denies that she used any abusive language. Lawrence testified that he had never heard Ms. Ford use abusive language. *Id.* at 39-87.

Leonhardi was upset that Hub Gravlee and Bud Waters, Examining Board employees who lived and/or worked in the Huntsville area, might "get in trouble" for writing the letter. Exh. 42-71. He "figured" whoever wrote the letter would probably get in trouble. *Id.* at 88.

The morning after Lawrence returned to the office, he asked to see Ford first thing. Exh. 38-62. He showed Ford the letter and asked her if she had written it. *Id.* She replied that she had. *Id.* at 63. Lawrence then presented Ford with a resignation letter for her signature that he had prepared the previous night, before he had talked to Ford. Exh. 39-56-57, 64, 72, 96-97 & Exhs.7 & 8. Ford refused to sign the letter, and Lawrence terminated her. Exh. 39-72-74 & Exhs. 7 & 8. The reasons stated for her termination were: (1) disruptive conduct; (2) insubordination; and (3) abusive language. Exh. 39-Exh. 9-¶ 1.

B. Proceedings Below

Ford filed a complaint against defendants/respondents alleging that they had terminated her employment with the Examining Board in violation of her First Amendment/free speech rights. R1-1. After discovery, the defendants moved for summary judgment on the grounds that her termination was proper under the *Pickering* balancing test and that Lawrence was immune from suit under the qualified immunity doctrine.

The district court granted the defendants' motion. (App. 1a). In the accompanying Memorandum Opinion, the district court held:

> Plaintiff has not cited any cases which clearly establish that it violates the First Amendment to terminate an employee who writes *an anonymous* letter which impugns the integrity of the supervisor and leaves him to speculate or further inquire as to the author, thus causing a [sic] accusations and recriminations among employees who must work with mutual trust.

(App. 12a). Therefore, it dismissed the claims against Lawrence in his individual capacity based on qualified immunity. (App. 14a). The district court also dismissed the official capacity claims against the Examining Board "based on the manner and form of plaintiff's action, the need for a close working relationship, and the fact that her supervisor's integrity was impugned. There [was] no way that plaintiff, Lawrence and perhaps others could continue to work together in mutual trust." (App. 15a). On August 28, 1996, it entered an order dismissing all claims. Ford filed a timely notice of appeal and appealed to the Eleventh Circuit Court of Appeals.

Jurisdiction in the Eleventh Circuit Court of Appeals was pursuant to 28 U.S.C. § 1291, as this was an appeal from a final judgment.

The Eleventh Circuit affirmed the district court with no opinion. (App. 16a).

REASONS FOR GRANTING THE WRIT

I.

CAN A STATE OFFICIAL DISRUPT THE EFFICIENT FUNCTIONING OF HIS OFFICE, THUS TIPPING THE *PICKERING* BALANCE IN FAVOR OF THE STATE AS EMPLOYER, BASED ON THE OFFICIAL'S UNLAWFUL RETALIATORY RESPONSE TO AN EMPLOYEE'S SPEECH ON A MATTER OF PUBLIC CONCERN?

In its opinion, the district court held:

On consideration of *Pickering*,[1] *Connick*[2]

---

1. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

2. *Connick v. Myers*, 461 U.S. 138 (1983).

> and other cases and the "time, place and manner" of the letter, the court concludes that there was no Constitutional violation. While there may be an issue as to the essential "public concern" element, the court's decision is based upon the manner and form of the plaintiff's action, the need for a close working relationship, and the fact that her supervisor's integrity was impugned. There is no way that [Ford], Lawrence and perhaps other could continue to work together in mutual trust.

App. 14a-15a (footnotes omitted).

The district court's opinion indicates that it believed that the Examining Board's interest as an employer outweighed Ford's free-speech interest because of the "manner and form" of her speech. As stated above, Ford sent an anonymous letter to four members of the Board, complaining that Lawrence may be using his state car for excessive personal use. The letter was post-marked from Huntsville, Alabama.

The purpose of the so-called balancing test was explained by this Court as follows:

> The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." This balancing in

> necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

Rankin v. McPherson, 483 U.S. 378, 384 (1987) (quoting *Pickering*, 391 U.S. at 568, 574; other internal citations omitted) (emphasis in original).

The focus of the balancing test is on the State's interest in "the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." *Rankin*, 483 U.S. at 388. The State has the burden of "justifying a particular discharge"; this burden "varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150. "[A] stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.* at 152.

However, the evidence presented to the district court showed that the letter did not interfere with the work of the Examining Board, affect personnel relationships, or affect Ford's job performance. All of the adverse consequences arose, not from the speech, but from Lawrence's quest to punish the speaker. Ford was fired for the content of her speech, not its effect on the efficient functioning of the Examining Board.

Although "private expression . . . may in some situations bring additional factors to the *Pickering* calculus," *Givhan v. Western Consolidated School District*, 439 U.S. 410, 415, n.4 (1979), "a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee." *Rankin*, 483 U.S. at 388, n.13 (agreeing with J. Powell's concurring opinion, in which he wrote, "If a statement is on a matter of public concern, as it is here, it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace. The risk of a single, off-hand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful." *Id.* at 393 (Powell. J., concurring)). The speech in this case was a letter, mailed to four board members; it was not disseminated by Ford to other employees, although Lawrence eventually discussed the letter with most of the employees.

Speech that "seek[s] to bring to light actual or potential wrongdoing or breach of public trust on the part of [government officials]," *Connick*, 461 U.S. at 148, is "a core concern of the First Amendment." *Fikes v. City of Daphne*, 79 F.3d 1079, 1084 (11th Cir. 1996) (quoting *Connick*, 461 U.S. at 148); *see also Morales v. Stierheim*, 848 F.2d 1145, 1149 (11th Cir. 1988), *cert. denied sub nom, Leon v. Avino*, 489 U.S. 1013 (1989). The speech in this case is the anonymous letter. The content of the

letter clearly seeks to expose potential wrongdoing or breach of the public trust by Lawrence, *i.e.*, his improper personal use of the state automobile. Thus, the content of the speech falls within the "core concern of the First Amendment." *See Fikes*, 79 F.3d at 1084. Moreover, Ford's speech was "private" in the sense that it was internal. This Court has held, "The First Amendment forbids the abridgement of the 'freedom of speech.' Neither the Amendment itself not our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan*, 439 U.S. at 415-16. In this case, Ford did not lose her right to free speech, and the manner of her communication weighed in her favor because the letter was not disruptive to the office. That is, it was not disruptive until Lawrence decided that he would punish the author for accusing him of malfeasance.

The district court also found that the anonymity of the letter and the Huntsville postmark balanced in favor of the employer because it caused "accusations and recriminations among employees." (App. 12a). This Court has held that the decision to communicate anonymously is an "aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1511, 1516 (1995). Moreover, the facts of this case clearly demonstrate the value of protecting anonymous speech on issues of public concern regarding the reporting of possible malfeasance of office. Ford presented evidence that she believed that Lawrence would fire her for reporting the misuse of his state vehicle. She also presented testimony that other employees agreed with her assessment. Indeed, Leonhardi had told Lawrence that Ford had written the letter because he was afraid that Lawrence would retaliate against the employees that lived and/or worked in Huntsville.

The district court, relying on arguments of the defendants,

held that the situation created by Lawrence's attempts to determine the author of the letter so that he could punish him/her was sufficiently disruptive of the efficient functioning of the office to hold that the balance favored the Examining Board, and not Ford's speech. However, the speech, which is of core concern, did not disrupt the functioning of the office; clearly, Lawrence's quest to punish the speaker for the content of the speech — which violates the First Amendment — was the only disruptive influence in the office.

"*Pickering* states that the First Amendment *requires the government* not just to show that certain employee speech injures the government, but *to show that the benefits of preventing the injury actually outweigh the profound benefits of free speech in this society.*" *Porter v. Califano*, 592 F.2d 770, 779 (5th Cir. 1979) (emphasis added). Thus, after a plaintiff shows that the speech was upon a matter of public concern, it is the *State's burden* to justify the discharge; the more substantially the employee's speech involves matters of public concern, the stronger the State's showing that the discharge was justified must be. *Connick*, 461 U.S. at 150-52.

> *The First Amendment balancing test can hardly be controlled by a finding that disruption did occur.* An employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be *absurd* to hold that the First Amendment generally authorizes *corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.* Of course, as *Pickering* indicates, the chilling of even accurate speech may be justified in certain extreme situations, for

> example, in which the employee unduly breached confidentiality or disrupted intimate working relationships. The point is simply that the balancing test articulated in *Pickering* is truly a balancing test, with office disruption or breached confidences being only weights on the scale.

Porter, 592 F.2d at 773-74 (emphasis added).

In this case, Ford had information that Lawrence may be using his state vehicle for excessive personal use. She reported this information to several of the Board members that she thought would investigate the matter. *See* Exh. 38-61 & Exh. 3-3. The letter was anonymous because she feared retaliation from Lawrence. *Id.* at 72. Her speech clearly raised a "core" concern of the First Amendment by informing the Board of Lawrence's possible malfeasance. She did not seek to publicize her concerns in a manner that would damage the public reputation of the Examining Board or Lawrence, nor did she spend the agency's time "broadcasting [her] rancor." *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989). The operations of the agency were not disrupted by the speech; rather, any disruption was the result of Lawrence's search for the author of the letter with the intent to punish that employee for the content of his or her speech. The balancing of interests is clearly in favor of the plaintiff's exercise of her First Amendment rights.

II.

IS THE LAW CLEARLY ESTABLISHED, DESPITE THE LACK OF FACTUALLY IDENTICAL PRECEDENT, THAT A STATE OFFICIAL MAY NOT FIRE AN EMPLOYEE FOR WRITING AN ANONYMOUS LETTER ACCUSING THE OFFICIAL OF MISUSE OF STATE FUNDS?

The district court held:

> Plaintiff has not cited any cases which clearly establish that it violates the First Amendment to terminate an employee who writes *an anonymous* letter which impugns the integrity of the supervisor and leaves him to speculate or further inquire as to the author, thus causing a [sic] accusations and recriminations among employees who must work with mutual trust.

(App. 12a).

This statement reflects an erroneous analysis of the defense of qualified immunity.

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

> When the law contemplates some kind of balancing test to determine the ultimate

> question of lawfulness or unlawfulness of an act, qualified immunity almost always applies to shield the public servant defendant: the lack of bright lines associated with balancing tests prevents the preexisting law, given the circumstances of a specific case, from having been clearly established when the public servant took the step that resulted in his later being a defendant in a lawsuit.

Foy v. Holston, 94 F.3d 1528, 1535, n.8 (11th Cir. 1996) (citing *Hansen v. Soldenwagner*, 19 F.3d 573, 575 (11th Cir. 1994)).

Analysis of allegations of violations of a public employee's right to free speech necessarily involve the *Pickering* balancing test. "Because no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary circumstances where *Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful." *Cooper v. Smith*, 89 F.3d 761, 764 (11th Cir. 1996) (an example of such an inevitable case; plaintiff was terminated for cooperating with investigation into allegations of corruption).

In *Harlow*, this Court held:

> By defining the limits of qualified immunity essentially in objective terms, *we provide no license to lawless conduct.* The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would

> violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)) (emphasis added).

"Some sacrifice of individual rights for the sake of effective government is the inevitable price of living in a society organized and run by fallible human beings." Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 Cornell L. Rev. 462, 470 (1990) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974) ("The concept of immunity assumes . . . that it is better to risk some error and possible injury from such error than not to decide at all.")). However, despite the admonition of this Court to the contrary, the Eleventh Circuit has required the existence of a factually indistinguishable case in order to find that the law is clearly established.

The Eleventh Circuit has held that a plaintiff, defending against a claim of qualified immunity, "must establish more than broad legal truisms; [s]he . . . must demonstrate that the law fixed the contours of the right so clearly that a reasonable official would have understood his acts were unlawful." *Dolhite v. Maughon*, 74 F.3d 1027, 1040-41 (11th Cir.), *cert. denied*, 117 S. Ct. 185 (1996). Thus, "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the

circumstances." *Lassiter v. Alabama A & M University Board of Trustees*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc). Moreover, officials need not " 'be creative or imaginative in drawing analogies from previously decided cases.' " *Id.* at 1150 (citations omitted).

> If the case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. The line is not to be found in abstractions — to act reasonably, to act with probable cause, and so forth — but in studying how these abstractions have been applied in concrete circumstances.
>
> When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar. Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.

Suissa v. Fulton County, 74 F.3d 266, 269-70 (11th Cir. 1996). *Cf. McMillian v. Johnson*, 88 F.3d 1554, 1565 ("Nevertheless, for the law to be clearly established, a court need not have found the *very action* in question unlawful; *what is essential is that the action's unlawfulness be apparent in light of pre-existing law.*") (emphasis added), *amended*, 101 F.3d 1363 (11th Cir. 1996).[3]

---

3. In *McMillian*, a case regarding liability for punishment of a pre-trial detainee. The Eleventh Circuit held:

(Cont'd)

The facts show that Lawrence knew that Ford had written an anonymous letter accusing him of possible misuse of his state vehicle. He knew that the letter had been sent to Board members. He also knew that he had attempted to find out who wrote the letter. He considered the letter to be a challenge to his authority, even though the letter does not challenge Lawrence's authority, but reports his possible misuse of his state vehicle. He knew that he had targeted Hub Gravlee and Bud Waters as possible authors; the fact that other employees were at risk of discipline for accusing Lawrence of misusing his state vehicle upset Leonhardi. Lawrence knew that Leonhardi was upset and had alleged that Ford had called him a "son-of-a-bitch;" however, he also knew that he had never heard Ford use such language. He knew that Leonhardi claimed that Ford had used the appellation in response to learning that Leonhardi had told Lawrence that Ford had written the letter. Lawrence did not know that the office was less efficient because of the letter. Finally, Lawrence had planned to terminate Ford's employment prior to even asking her if she wrote the letter, which she did not deny writing, or if she had used abusive language to Leonhardi, which she did deny.

(Cont'd)

> We do not view the absence of a case factually similar to the extraordinary allegations in this case as an indication that the law was not clearly established that confining a pretrial detainee on death row to punish him is unconstitutional. *Bell*'s prohibition on *any* pretrial punishment, defined to include conditions imposed with an intent to punish, should have made it obvious to all reasonable officials in [the defendants'] place[es] that holding McMillian on death row to punish him before he was tried violated McMillian's due process rights.

McMillian, 88 F.3d at 1565 (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)) (emphasis in original).

The district court held that, because there was no case that "clearly establish[ed] that it violates the First Amendment to terminate an employee who writes an anonymous letter which impugns the integrity of the supervisor and leaves him to speculate or further inquire as to the author, thus causing accusations and recriminations among employees," Lawrence was entitled to qualified immunity. (App. 12a-13a). However, this is not a dog bite case[4] and Lawrence cannot cloak himself in qualified immunity simply because, at the time of his actions, there was no case with the same facts.

> Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. It protects enforcement officers from bad guesses in gray areas and ensures that they are liable only for transgressing bright lines. Thus, although the exact conduct at issue need not have been held to be unlawful in order for the law governing an officer's actions to be clearly established, the existing authority must be such that the unlawfulness of the conduct is manifest.

Wilson v. Layne, 110 F.3d 1071, 1075 (4th Cir. 1997) (internal quotations and citations omitted).

This Court, in an opinion addressing a conviction under 18 U.S.C. § 242, discussed the level of specificity required to hold that a Constitutional violation is "clearly established." *United States v. Lanier*, 117 S. Ct. 1219 (1997). The Court reversed the Sixth Circuit opinion, which had held that

4. It is generally, though not accurately, held that a dog is entitled to one bite before its owner will be said to be liable; the theory being that the owner was not aware of the animal's vicious propensities. *See Zarek v. Fredericks*, 138 F.2d 689, 690 (3d Cir. 1943).

> criminal liability may be imposed under § 242 only if the constitutional right said to have been violated is first identified in a decision of [the Supreme] Court (not any other federal, or state, court), and only when the right has been held to apply in "a factual situation *fundamentally similar* to the one at bar."

Id. at 1223 (emphasis added). The Court equated the "clearly established" requirement under qualified immunity cases, with the "fair warning" requirement from "void-for-vagueness" cases. The Court held that the law could be "clearly established" without an existing case based on "fundamentally similar" facts. It held:

> [W]e think the Sixth Circuit's "fundamentally similar" standard would lead trial judges to demand a degree of certainly at once *unnecessarily* high and likely to beget much wrangling. . . .
>
> In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants' "reasonably can anticipate when their conduct may give rise to liability," by attaching liability only if "the contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. So conceived, the object of the "clearly established" immunity standard is not different from that of "fair warning" as it relates to law "made specific" for the purpose of validly applying § 242. The fact that one

has a civil and the other has a criminal law role is of no significance; both serve the same objective, and in effect *the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.* To require something clearer than "clearly established" would, then, call for something beyond "fair warning."

This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. *But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful.* As Judge Daughtrey noted in her dissenting opinion in this case, "[t]he easiest cases don't even arise. . . ." In sum, as with civil liability under § 1983 or *Bivens*, all that can usefully be said about criminal liability under § 242 is that *it may be imposed for deprivation of a*

> *constitutional right if, but only if, "in light of pre-existing law the unlawfulness [under the Constitution is] apparent." Where it is, the constitutional requirement of fair warning is satisfied.*

Id. at 1227-28 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987)) (other internal quotations and citations omitted; emphasis added).[5]

The Court's opinion lessens considerably the strict reliance on a "spotted cow" case[6] to establish "fair warning" that the official's conduct violates a constitutional right. This Court has emphasized the need for similar factual situations in order to prove that the law was "clearly established." However, as recently held by the Supreme Court, the standard is whether the law is such that a reasonable official would have "fair warning" that his or her conduct violates a constitutional right.

5.

> It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Creighton, 483 U.S. at 639-40.

6. A "spotted cow" case is a case that "is exactly like the case that is before the Court." *Picker International, Inc. v. Parten*, 935 F.2d 257, 261 (11th Cir. 1991).

For example, the Seventh Circuit, in *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994), held that, reading the complaint in the light most favorable to the plaintiff, the complaint stated that the defendant/public employer had "punished" the plaintiff/public employee for writing a novel, "without having any legitimate reason for such punishment." The court went on to state, in response to the defense of qualified immunity, "This is such an elementary violation of the First Amendment that the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with well-recognized constitutional principles. The easiest cases don't even arise." *Id.* (internal citations and quotations omitted).

The law was clearly established that Lawrence's conduct violated Ford's First Amendment/free speech rights. In this case, Ford wrote an anonymous letter accusing Lawrence of malfeasance in office. For this, she was fired. As justification for firing her, Lawrence claimed that she was insubordinate. The evidence shows that he considered her insubordinate for complaining about him to the Board members. He also said that her conduct disrupted the office; nevertheless, he testified that he did not observe any disruption prior to her being fired. He also claimed that she was fired for using abusive language to Leonhardi. However, Lawrence never questioned Ford regarding abusive language, Ford denies using any abusive language, and Lawrence testified that he had never heard Ford use any abusive language. In short, there was no good reason to fire Ford.

Thus, although there is no case exactly on point, the evidence overwhelming indicates there is no evidence to weigh on the Examining Board's side of the *Pickering* scale against Ford strong right to speak out against Lawrence's abuse of his office. Other than the content of her speech that accused him of wrongdoing, there was no reason for Lawrence to fire Ford, and a reasonable official would know that he could not fire a public

employee for expressing her right to speak on a matter of public concern in the absence of a countervailing interest of the State as an employer. Accordingly, Lawrence was not entitled to qualified immunity from suit.

CONCLUSION

Based on the foregoing, Ford respectfully requests this Court accept this petition and grant her a writ of certiorari.

Respectfully submitted,

BYRON R. PERKINS
REBECCA J. ANTHONY
Counsel of Record
GORDON, SILBERMAN, WIGGINS & CHILDS
Attorneys for Petitioner
1400 Southtrust Tower
Birmingham, Alabama 35203-3204
(205) 328-0640

APPENDIX A — FINAL JUDGMENT AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION ENTERED AUGUST 28, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV 95-PT-1807-S

DEBRA J. FORD,

Plaintiff,

vs.

EDGAR LAWRENCE, et al,

Defendants.

FINAL JUDGMENT

In accordance with a Memorandum Opinion filed contemporaneously herewith, defendants' Motion For Summary Judgment filed on June 14, 1996 is **GRANTED**. This action is **DISMISSED WITH PREJUDICE**. Costs are assessed against plaintiff.

DONE and **ORDERED** this 28th day of August, 1996.

s/ Robert B. Propst
ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE

Appendix A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV 95-PT-1807-S

DEBRA J. FORD,

Plaintiff,

vs.

EDGAR LAWRENCE, et al,

Defendants.

MEMORANDUM OPINION

This cause comes on to be heard on defendants' Motion for Summary Judgment filed on June 14, 1996.

On or about September 17, 1994, plaintiff caused an anonymous letter to be mailed to four members of the Plumbers and Gas Fitters Examining Board (Board). The letter raised a question about the use by defendant Edgar Lawrence of a state owned automobile. At the pertinent time(s), Lawrence was the Executive Director of the Board. Plaintiff's anonymous letter stated that Lawrence was using an ordinary automobile license tag on the state owned vehicle rather than a state tag. The inference suggested was that Lawrence was using the state owned vehicle for private purposes.

The publication of the letter caused Lawrence to question

various members of his staff about the letter. One staff member told Lawrence that plaintiff had acknowledged writing the letter. Lawrence terminated plaintiff. She appealed her dismissal and a hearing officer appointed by the Personnel Board of the State of Alabama recommended that "the termination order be sustained." The Personnel Board affirmed the decision to terminate plaintiff.

In her recommendation, the hearing officer noted, *inter alia*, the following:

> Lawrence testified private vehicles are routinely replaced with State tags. A private tag is used for unusual circumstances. For example on one occasion Lawrence went to the Mobile area to conduct an investigation where the use of his personal issued tag was placed on the vehicle to avoid the identification process.
>
> . . .
>
> The purpose of an unmarked vehicle, according to the witness, was to aid in the investigation of uncertified persons who are performing gas and plumbing work particularly around the Alabama borders. Any person may letter petition the probate judge with the VIN number and other description of the vehicle detailing therein why a cover tag is needed. The person would pay taxes of $3.00 per day for use of vehicle for going back and forth to work.

Appendix A

. . .

Lawrence testified he suspected two other employees because they worked in the Huntsville area. The unsigned letter was stamped with a Huntsville, Alabama postmark.

Two employees told Lawrence, Debra Ford had written the letter. At one point Ford brought a faxed copy which contained the letter to the witness.

The Board, on consideration, upheld termination of employee.

Debra Ford admitted going into Lawrence['s] file folder and taking out information as to the car tag. She did, however, deny any abusive language which interrupted the process.

On September 14 or 15 witnesses testified to writing a letter to the Board upon noticing Lawrence's vehicle with a private tag and not a state tag. Ford testified she did not do anything about these factors when she first observed them.

. . .

Ford testified to giving a friend Patsy Williams the unsigned letter who gave the

letter to a truck driver either at Williams home or her office.

. . .

Lewis Moore, Chairman of the Plumbers & Fitters Examiners Board. On board since 1988. He served for 30 years as superintendent of the Water Board of Sheffield.

When Lawrence called and told him what the letter said, Chairman Moore told Lawrence he would terminate a person on insubordination for such activity.

. . .

Moore said he had a problem with Ford's conduct because of the false implications and Ford's trying to set up two other people.

. . .

Employee Ford wrote and published an unsigned letter to members of the Plumbers and Gas Fitters Board. Therein she maliciously accused and implied actual and open misconduct by the executive director. Ms. Ford accused Mr. Edgar Lawrence [of] operating his state owned and issued vehicle for Lawrence's personal use and further placing a personal vehicle license tag on the

State owned and issued vehicle in order, she felt, to conceal such personal use.

Ms. Ford admitted to three compliance officers that she sent the letter. Thereafter she called Hardy and cursed him for telling Lawrence what she said.

. . .

Employee chose to forward anonymous letter and went to great length to conceal her identity by having the letter mailed from Huntsville by a truck driver.

Other employees may have been caused great harm had Ford not ultimately admitted her participation.

Also, the endurable [sic] stress and discomfort of the work environment which was visited upon employees during the investigative process may not have occurred had employee Ford revealed her identity when she wrote the letter.

Any employee should be allowed to properly inquire into office procedure and policy. A more direct inquiry into the matter could have been beneficial to the employee.

. . .

Appendix A

After consulting all the evidence presented, the Hearing Officer is of the opinion [that] the statements and actions of employee Ford produced unnecessary, unreasonable, and disrespective behavior.

The conduct as established is improper and unacceptable. Employee used work time, supplies, equipment and files to arrive at an erroneous conclusion which caused employee Edgar Lawrence embarrassment, harm and possible damage to his reputation and work record by having to investigate improperly gathered allegations and information.

The behavior should not be tolerated.

The termination as enacted and upheld by the Board of the Plumbers and Gas Fitters is persuasive.

It is therefore the recommendation of the Hearing Officer that the termination order be sustained.[1]

/s/ Carole C. Smitherman, Hearing Officer.

---

1. The court does not reach any possible issue of collateral estoppel related to the pursuance of an administrative appeal, the availability thereafter of state court review, the reservation or non-reservation of Constitutional issues, etc. In the event of an appeal, the parties may wish to address such issues. The court has also not reached the issue of Eleventh Amendment immunity as it relates to the official capacity claims. See also *Will v. Michigan Dept., etc.*, 491 U.S. 58 (1989) (neither state nor state officials in official capacities); and *Sharpley v. Davis*, 786 F.2d 1109 (11th Cir. 1986).

Appendix A

Claims Against Individual Defendants

The plaintiff has acknowledged that summary judgment is due to be granted as to defendant Moore in his individual capacity. The only other defendant sued in his individual capacity is Lawrence. The action against the Board members in their official capacities is the same as an action against the Plumbers and Gas Fitters Examining Board.

Qualified Immunity Assertion of Lawrence

In *Hansen v. Soldenwagner*, 19 F.3d 573 (11th Cir. 1994), the court stated:

> Qualified immunity protects government officials performing discretionary functions from civil liability if their conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known."

Id. at 575.

> To be established clearly, a right must be so particularized that "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Pre-existing law—whether it be case law or statutory law—must be available to instruct in a concrete way the government agent, given the circumstances. "The contours of the right must be sufficiently

clear that a reasonable official would understand that what he is doing violates that right." *Id.* (emphasis added). A recent en banc decision explains plaintiff's considerable burden:

> When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar. *See, e.g., Edwards v. Gilbert*, 867 F.2d 1271, 1277 (11th Cir. 1989). Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.

Adams v. St. Lucie County Sheriff's Dept., 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmondson, J., dissenting), approved en banc, 998 F.2d 923 (11th Cir. 1993).

The question before us is not whether, in general, public employees enjoy some freedom under the First Amendment to speak on matters of public concern; they do. Nor is the question whether public employees have an interest in providing truthful testimony in criminal cases; they do. Here, as in all qualified immunity cases, the question is fact specific: in April 1990, was it clearly

established in this circuit that it was unconstitutional for police officials to investigate and to suspend an officer for making vulgar, insulting, and defiant criticisms of the department while giving testimony at a deposition pursuant to a subpoena? The answer is "No."

Past cases show that defendants who allegedly violate public employees' First Amendment freedoms rarely act within "clearly established" contours of law:

> The Supreme Court has never established a bright-line standard for determining when the State as an employer may take action adverse to an employee in response to that employee's speech. Instead, the Court has balanced the interest of the employee in commenting on matters of public concern against the interest of the employer in performing public services efficiently.

Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989) (citing *Pickering v. Board of Education*, 391 U.S. 563, 576, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968).

Because Pickering requires a balancing of competing interests on a case-by-case

> basis, our decisions tilt strongly in favor of immunity by recognizing that only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated "clearly established" federal rights. See *Dartland*, 866 F.2d at 1323-24. When "no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where Pickering balancing would lead to the inevitable conclusion that the [act taken against] the employee was unlawful." *Id.* at 1323 (emphasis added); *see also Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1236-37 (11th Cir. 1992); *Busby v. City of Orlando*, 931 F.2d 764, 773-75 (11th Cir. 1991) (per curiam).

Id. at 575-76.

> The decisions in *Dartland* and *Sims* make clear that, because this multi-factor balancing process admits of few bright lines, a government agent will know only in the most extraordinary circumstances that "what he is doing" does violate plaintiff's rights. *Dartland*, 866 F.2d at 1323; *Sims*, 972 F.2d at 1236-37.

Id. at 576.

> Precedents recognize that the manner of a public employee's speech is an important element in the Pickering balance. *See Morales v. Stierheim*, 848 F.2d 1145, 1149 (11th Cir. 1988); *Bryson*, 888 F.2d at 1567.

Id. at 577.

> In this case, the Pickering balance is also affected—and its outcome made doubtful—by the special concerns of quasi-military organizations such as police departments. Order and morale are critical to successful police work: a police department is "a paramilitary organization, with a need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employers."

Id. at 577.[2]

Plaintiff has not cited any cases which clearly establish that it violates the First Amendment to terminate an employee who writes *an anonymous* letter which impugns the integrity of the supervisor and leaves him to speculate or further inquire as to the author, thus causing a accusations and recriminations among employees who must work with mutual trust.[3]

---

2. The court notes that the Board investigates various circumstances under its jurisdiction.

3. Also see *Cross v. State of Alabama*, 49 F.3d 1490, 1503 (11th (Cont'd)

Appendix A

(Cont'd)

Cir. 1951) While the court does not rely on the point it does note that while plaintiff disputes that she called a fellow employee a SOB after he reported that she wrote the letter, it is apparently undisputed that Lawrence was so informed. In the alternative, the court does determine that a *Pickering* analysis leads to the conclusion that there has been no Constitutional violation. *See Pickering v. Board of Ed., etc.*, 391, U.S. 563, 568-70 where the court said:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

. . .

> An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here.

. . .

(Cont'd)

Appendix A

The motion will be granted as to the claim against Lawrence in his individual capacity.

Official Capacity Claims

On consideration of *Pickering, Connick* and other cases and the "time, place and manner" of the letter, the court concludes that there was no Constitutional violation. While there may be an issue as to the essential "public concern" element,[4] the court's

---

(Cont'd)

> Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.

Plaintiff's duties for Lawrence are listed in her brief. They indicate the need for mutual trust. Cf. *McDaniel v. Woodard*, 886 F.2d 311 (11th Cir. 1989).

4. In her deposition, plaintiff stated,

> Q. So there was nothing illegal in your mind as far as the fact he had obtained the private tag, was there?
>
> A. No sir.
>
> Q. What bothered you about it was that he had it and the guys in the field didn't?
>
> A. Right.
>
> Q. And he didn't need it for that reason because he doesn't investigate?

(Cont'd)

decision is based upon the manner and form of plaintiff's action, the need for a close working relationship, and the fact that her supervisor's integrity was impugned. There is no way that plaintiff, Lawrence and perhaps others could continue to work together in mutual trust.[5]

Plaintiff had an appropriate remedy under state law. Although the availability of such a remedy does not defeat a fundamental Constitutional claim, it does suggest that all such personnel decisions need not rise to a Constitutional level, particularly where, as here, the purported Constitutional violation is anything but clear.[6]

The case will be dismissed.[7]

This 28 day of August, 1996.

s/ Robert B. Propst
ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE

(Cont'd)

MS. ANTHONY: Object to form.

A. Right.

5. The court notes that since the letter was mailed from Huntsville rather than from where plaintiff worked or resided, employees who worked in the Huntsville area were initially suspected.

6. Again, the court does not address any possible collateral estoppel or *res judicata* issues when Constitutional claims are not reserved. The court also does not reach Eleventh Amendment or *Will* issues.

7. The motion to disqualify is moot. The court's final decision is not based upon attorney advice.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 18, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6989

D. C. Docket No. CV-95-PT-1807-S

DEBRA J. FORD,

Plaintiff-Appellant,

versus

EDGAR LAWRENCE, in his official capacity as the Executive Director of Plumbers & Gas Fitters Examining Board and in his individual capacity, LEWIS MOORE, in his official capacity as Chairman of the Plumbers & Gas Fitters Examining Board and in his individual capacity, MICKEY DRUMMOND, in his official capacity as vice-chairman of the Plumbers & Gas Fitters Examining Board, GERALD SMITH, in his official capacity as Secretary of the Plumbers & Gas Fitters Examining Board, JOHN RILEY, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(July 18, 1997)

Appendix B

Before ANDERSON and COX, Circuit Judges, and ALARCON*, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. *See* 11th Circuit Rule 36-1.

"Costs taxed against plaintiff-appellant."

Entered: July 18, 1997
For the Court: Miguel J. Cortez, Clerk
By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 8/18/97

---

* Honorable Arthur L. Alarcon, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

(2)

Supreme Court, U.S.
FILED
DEC 4 1997
CLERK

No. 97-676

In The

Supreme Court of the United States

October Term, 1997

DEBRA J. FORD,

Petitioner,

vs.

EDGAR LAWRENCE, in his official capacity as the Executive Director of Plumbers & Gas Fitters Examining Board and in his individual capacity; LEWIS MOORE, in his official capacity as Chairman of the Plumbers & Gas Fitters Examining Board and in his individual capacity; MICKEY DRUMMOND, in his official capacity as vice-chairman of the Plumbers & Gas Fitters Examining Board; GERALD SMITH, in his official capacity as Secretary of the Plumbers & Gas Fitters Examining Board; JOHN RILEY, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board; DANNY PRICE, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board; DAVID LECROY, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board; FRED PALMER, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

G. THOMAS SULLIVAN
Counsel of Record
VINCENT, HASTY, SULLIVAN,
ELLIOTT & TIDMORE, P.C.
Attorneys for Respondents
2090 Columbiana Rd.
Suite 4400
Birmingham, AL 35216
(205) 979-4490

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25 pp

ISSUES PRESENTED BY PETITION

1. Whether the Petitioner has presented important or substantial federal issues of and in a manner sufficient to serve as a basis to justify issuance of the writ.

2. Whether the Court of Appeals erred in affirming the District Court's grant of a state official's motion for summary judgment on an employee's official capacity claim where the employee was discharged for conduct relating to the mailing of an anonymous letter, and where her activities incident to writing and sending the letter, and her additional activities thereafter, were disruptive, insubordinate, and were accompanied by the use of abusive language, all of which destroyed the atmosphere of mutual trust in her department and impaired the efficient operation of the state Agency.

3. Whether the Court of Appeals erred in affirming the District Court's grant of a state official's motion for summary judgment based on qualified immunity where an employee was discharged by the state official, exercising his discretionary authority, for violating Alabama State Personnel Board rules which prohibit insubordination, disruptive behavior and use of abusive language to a fellow employee, and where the state official was not prohibited from doing so by clearly established law.

TABLE OF CONTENTS

Page

Tables of Contents ii

Table of Citations iv

Respondents' Brief in Opposition to Petition for a Writ of Certiorari 1

Opinion Below 1

Constitutional and Statutory Provision Involved 1

I. Proceedings Below 1

A. Statement of the Case 1

B. Statement of the Facts and Proceedings Below 3

II. Reasons Why the Writ Should Be Denied 6

A. In General 6

B. Official Capacity Claim 7

1. Ford Was Discharged for Insubordination, Disruptive Conduct, and Use of Abusive Language and Not for the Exercise of Protected First Amendment Speech 8

A. Ford's communication was not a matter of public concern, but was a personal complaint about an internal Agency matter 8

(1) The content of Ford's communication was not a matter of public concern, but rather reflected an internal complaint.. 9

(2) The context of Ford's communication did not reflect a matter of public concern but rather reflected an internal complaint 11

TABLE OF CONTENTS – Continued

Page

(3) The form of Ford's speech did not indicate a matter of public concern..... 11

B. Under the *Pickering* balancing test, the State's interests in promoting the efficiency of the Agency outweigh Ford's interests in communicating as she did..... 12

(1) A close working relationship is essential for the Board to fulfill its public functions..... 13

(2) The time, manner and place of Ford's letter further contributed to disruption of the Agency's functions..... 14

(3) The State's interests in ensuring the proper operation of the Agency further outweigh Ford's interests in making the speech..... 15

2. Qualified Immunity..... 17

A. Qualified immunity shields Lawrence's discretionary action in the discharge of Ford... 17

B. Lawrence's discharge of Ford did not violate clearly established law..... 18

Conclusion..... 19

TABLE OF CITATIONS

Page

CASES CITED:

Bryson v. City of Waycross, 888 F.2d 1562 (11th Cir. 1989) 8

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983) 7, 8, 11, 13, 16

Dartland v. Metropolitan Dade County, 866 F.2d 1321 (11th Cir. 1989) 18

Deremo v. Watkins, 939 F.2d 908 (11th Cir. 1991) 9

Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986) 9, 13

Fikes v. City of Daphne, 79 F.3d 1079 (11th Cir. 1996) 14

Gompers v. Buck's Stove and Range, Co., 221 U.S. 418 (1911) 12

Harris v. Board of Education, 1997 U.S. App. LEXIS 1201 (11th Cir. Jan. 23, 1997) 18

Hansen v. Soldenwagner, 19 F.3d 573 (11th Cir. 1994) 17, 19

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092 (1986) 19

McIntyre v. Ohio Elections Commissions, 115 S.Ct. 1511 (1995) 12

Morales v. Stierheim, 848 F.2d 1145 (11th Cir. 1988) 14

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968) 7, 8, 12, 13, 16, 19

Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891 (1987) 8, 16

Sims v. Metropolitan Dade County, 972 F.2d 1230 (11th Cir. 1992) 17

TABLE OF CITATIONS – Continued

Page

Stough v. Gallagher, 967 F.2d 1523 (11th Cir. 1992) 17

Suissa v. Fulton County, GA, 74 F.3d 266 (11th Cir. 1996) 19

STATUTES CITED:

42 U.S.C. §1983 ..... *passim*

Ala. Code §36-26A-1 15

UNITED STATES CONSTITUTION CITED:

United States Constitution, Amendment I 7, 13

OTHER AUTHORITY CITED:

Rules of the Supreme Court; Rule 10 6

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents respectfully request that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit be denied.

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals (App. 16a to Petitioner's Brief) was not reported. The judgment and opinion of the lower court is unreported. (App. 1a to Petitioner's Brief).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Ford claimed that the Respondents violated her First Amendment right to free speech under the United States Constitution, Amendment I, and brought this action pursuant to 42 U.S.C. §1983 (Supp. 1997).

I. PROCEEDINGS BELOW

A. STATEMENT OF THE CASE

On July 17, 1995, Debra J. Ford filed a complaint in the United States District Court for the Northern District of Alabama against Edgar Lawrence and others claiming that she had been fired in retaliation for her exercise of

free speech as protected by the First Amendment in violation of 42 U.S.C. §1983 (1994). R1-1-1. After extensive discovery, on August 28, 1996, the District Court granted Defendants' motion for summary judgment. R1-53-1.

This would be the fifth review of Ford's termination. Prior to review by the District Court, Ford received an evidentiary hearing before the Alabama State Personnel Board, at which she was represented by counsel of her selection. The Hearing Officer received testimony and found Ford's discharge for insubordination, disruptive conduct, and use of abusive language to have been justified. R1-52-2-5. R1-25-Exh. A & B. The Alabama State Personnel Board next reviewed and adopted the findings of the Hearing Officer and upheld Ford's discharge, specifically noting that it had searched the record for evidence of mitigation of punishment and found mitigation to be inappropriate. R1-25-Exh. A. Ford next filed her action in District Court. In the District Court's Memorandum Opinion accompanying the Final Judgment, the Court liberally cited the findings of the State Hearing Officer. R1-52-2-5.

Finding Ford's claim of a constitutional violation "anything but clear" , the District Court ruled in favor of Lawrence in the official capacity claim based on the manner and form of Ford's actions, the necessity for a close working relationship in her office, and her attack on Lawrence's integrity, which caused the Court to conclude that Ford, Lawrence, and other employees could not continue to work together in an atmosphere of mutual trust. R1-52-10-11. The District Court then granted summary judgment in favor of Lawrence in his individual capacity based on qualified immunity. R1-52-10. The decision of

the District Court was then reviewed de novo by the U.S. Court of Appeals for the 11th Circuit, and was affirmed on July 18, 1997.

B. STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

Respondents submit the following in clarification of Petitioner's Statement of Facts. Debra Ford was an employee of the Alabama Plumbers and Gas Fitters Examination Board. Edgar Lawrence is a compensated employee, is appointed by the Board as Executive Director and was sued individually and in his official capacity. Board Members are unsalaried political appointees and were sued in their official capacities only. The Board is a State Agency tasked with the enforcement and administration of the state licensing laws relating to plumbers and gas fitters. R1-1-2. Lawrence, as Executive Director, participates in investigations as part of the enforcement aspect of the Board's functions. Exh. 39-23-24.

Lawrence drives a vehicle provided by the State. On August 15, 1994, he received a new 1994 Chevrolet. On or about the same date, following a procedure established under authority of an Alabama Attorney General's Opinion, an ordinary license plate was requested from the Probate Court and obtained for the vehicle. Exh. 39-Exh.1. Lawrence placed it on the vehicle on or about September 13, immediately prior to traveling to Baldwin county for staff meetings with Board compliance officers (a type of inspector) who live and work in the Southern region of Alabama, which includes Mobile and Baldwin counties. Exh. 39-105-106.

On September 14, 1994 Ford spoke with David Wilcox, a compliance officer in the Southern region, and alleges that Wilcox told her the tag was on the vehicle because Lawrence "was going to" use the car to transport his wife to and from a restaurant job in Gulf Shores. She says she questioned Wilcox about how he knew this, and Wilcox said it was "little things" Lawrence said, but that Wilcox did not tell her any of these little things. Exh. 38-59-60. Wilcox denied making these statements. Exh. 41-17-19. At some point prior to September 17, 1994, Ford had searched Board files and photocopied the letter written to the Probate Judge requesting the tag, and the Attorney General's opinion governing the use of and procedure for acquisition of such tags on state vehicles. Prior to September 17, 1994 Ford then wrote an anonymous letter which mentioned that Lawrence's state vehicle had an ordinary license plate, which mentioned that Lawrence had such a plate when cars of field compliance officers did not, and which suggested that Lawrence "appeared to have decided to use" his State vehicle for personal use. The text of that letter will be set out hereafter.

The letter was mailed to four of the Board Members who were not officers. One of these, Danny Price, Ms. Ford had been told personally disliked Lawrence. R. 1-38-61 to 62. Ford gave the letters to a friend with instructions that they should be mailed from anywhere outside Walker County, where she resides. Exh. 38-71-72. The letters were postmarked September 17, 1994 from Huntsville, Alabama.

Within several days, Board members began reporting to Lawrence that they had received the letter. Lawrence

assumed from the context and terminology of the letter that an employee had written it, and, as would be expected, undertook to find out which employee. He reviewed employee itineraries to determine what employees had been in Huntsville during the period of the postmark, circulated copies of the letter within the department and asked certain persons if they knew who had written it. Exh. 39-35-39.

The letter became a topic of general discussion within the department. Exh. 42-57-58. Exh. 41-22. On September 28, 1994, Ford talked at work with three compliance officers, Wilcox, Leonhardi and Davis, and admitted writing the letter. Leonhardi and Wilcox testified that they asked Ford why she had done so and she responded, "Because I hate him [Lawrence]". Exh. 42-199-120. Exh. 41-27. Ford asked them to swear to not tell, and they so agreed. Exh. 41-26-28. On or about October 5, 1994, Leonhardi was questioned by Lawrence and disclosed what Ford had told him. Ford learned that Leonhardi had told, called him a son of a bitch, and informed him that she did not appreciate it and would never tell him anything else. Leonhardi reported that conversation to Lawrence. Ford admitted the conversation, but denied calling Leonhardi a son of a bitch. Exh. 42-90-91. Exh. 38-93-95.

On October 13, 1994 Lawrence called Ford to his office and offered her the option to resign for personal reasons and be placed back on the state job registry or be fired. Exh. 39-100-101. After telephoning her attorney and discussing the matter for over an hour, Ford elected to be terminated. Exh. 39-73. Ford was given notice that she was being terminated for insubordination, disruptive conduct and use of abusive language. Ford appealed to

the Alabama State Personnel Board which ordered an evidentiary hearing before a Hearing Officer, beginning the review process described above.

II. REASONS WHY THE WRIT SHOULD BE DENIED

A. IN GENERAL

Rule 10 sets forth the basic guidelines considered by this Court in determining whether to issue a writ of certiorari. These include a Court of Appeals decision which conflicts with a decision of a Court of Appeals of another circuit, or that the Court of Appeals has so departed, or sanctioned such a departure by the District Court, from the accepted and usual course of judicial proceedings as to call for exercise of this Court's supervisory power. (Rule 10(a)) Rule 10(c) adds as a basis that the Court of Appeals has decided an important federal question in a way which conflicts with relevant decisions of this Court. Rule 10 concludes with the admonition that the "writ of certiorari is rarely when an asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law".

Petitioner advances no case from any other circuit with which the decisions of the United States District Court for the Northern District of Alabama or the 11th Circuit Court of Appeals directly conflict. Neither has Petitioner cited any decision of this Court with which the District or Court of Appeals decisions conflict. Petitioner's argument questions the sufficiency of the evidence, the District Court's findings of fact and

application of existing law, the quantum of evidence presented to and considered by that Court on pivotal points, and advances argument with respect to how the content of Petitioner's speech should be characterized. As such, the Petitioner simply fails to assert any generally recognized basis for grant of the writ.

B. OFFICIAL CAPACITY CLAIM

Ford claims that she was wrongfully discharged in retaliation for her exercise of protected First Amendment speech. This Court would be called on to examine this claim under the *Connick* and *Pickering* tests. First, this Court would have to determine whether Ford's letter was a matter of public concern under *Connick*. In the *Connick* analysis, the Court would examine the content, form, and context of the letter. If it found public concern, this Court would proceed to determine whether under the *Pickering* balancing test, the State's interests in promoting the efficiency of the Agency outweighed Ford's interests in mailing the letter. In the *Pickering* analysis, the Court would examine the relationship between the parties involved, and the time, manner, place, and context of the speech.

The Courts found that the manner and form of Ford's letter and the need for a close working relationship between the parties involved provided a showing that the State's interests outweighed Ford's and that there was no constitutional violation involved. That decision involved application of properly stated principles of law and did not conflict with decisions of any other circuit or this Court.

1. Ford Was Discharged for Insubordination, Disruptive Conduct, and Use of Abusive Language and Not for the Exercise of Protected First Amendment Speech.

In order to prove her §1983 claim, Ford would have to first establish that the subject speech was of public concern. Having crossed the threshold, she must then survive a balancing test, initially showing that the right to communicate as she did outweighs the interest the State seeks to protect. If so, Ford would then have to establish that the content of the speech was a substantial part of the cause for termination. Only after Ford had cleared these hurdles would the State have to show that its response would have been the same irrespective of the protected conduct. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684 (1983) and *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 2896-97 (1987).

A. Ford's communication was not a matter of public concern, but was a personal complaint about an internal Agency matter.

At the first stage, the Court would examine the threshold issue of whether the employee's speech may be 'fairly characterized as constituting speech on a matter of public concern'. *Connick*, 461 U.S. 138, *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989). "If [Plaintiff's] speech cannot fairly be characterized as constituting speech on a matter of public concern, the inquiry is at

an end." *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir. 1986).

Whether an employee's communication constitutes a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. *Deremo v. Watkins*, 939 F.2d 908, 910, 911 (11th Cir. 1991) In applying the "content, form and context" analysis this Court would consider whether the communication was made in the employee's role as citizen or employee and the employee's motivation in speaking. *Deremo*, 939 F.2d 910-11.

(1) The content of Ford's communication was not a matter of public concern, but rather reflected an internal complaint.

Ford did not report public corruption, or even improper use of public property. Ford complained about Lawrence's assignment of equipment to personnel within her Agency with which she did not agree. Secondly, she falsely attacked and impugned her supervisor based on no evidence, and she directed the accusation intentionally to a Board member who she believed personally disliked him with the intent to cause him harm. (Exh. 38-61-62).

Ford's anonymous communication, in its entirety, is as follows:

> "Why is it that the Executive Director of the State of Alabama Plumbers and Gas Fitters Examining Board, Mr. Edgar Lawrence, is driving a 1994 Caprice automobile bought and paid for by that Agency without a State License Plate

> or any other markings on it to identify it as a State owned vehicle? This automobile is being driven around with a regular license plate on it. I think it very suspicious that Mr. Lawrence is the one who has this type of license plate on his vehicle *when the Compliance Officers for this Agency who actually go out in the field to investigate complaints do not have them also.* It would appear that Mr. Lawrence has decided to use this vehicle for his own personal use instead of just for STATE OF ALABAMA *business* as it was intended for it to be used. Sincerely yours, A VERY CONCERNED CITIZEN" [*Italics added*] Exh. 38-Exh. 1.

It is clear from the italicized portion of the letter that Ford was primarily concerned that the Executive Director, who she considered an administrator, had a private tag when field compliance officers did not, a matter of purely internal Agency concern. Ford freely admitted this in her deposition. (Exh. 38-79-80, 38-82-83, 38-127-128).

Ford also kept notes to memorialize her conversations with fellow employees and Lawrence. According to Ford, as recorded in her notes, on the morning of her termination Lawrence first showed her the letter and asked if she had written it, which she then admitted. She then stated that the compliance officers should be given the ordinary tags, since they did the investigating. (Exh. 38-6). Ford also did not say that Lawrence's use of the tag was wrong. His conduct was "suspicious" only because field compliance officers did not "also" have the tags. Exh. 38-Exh. 1.

The letter clearly states that Ford's personal complaint as an employee. It was so motivated and was not

the effort of a citizen informing the public through protected speech. The only theme therein addresses the fact that the Executive Director had a piece of equipment, a tag, supposedly more suitable for enforcement than the "troops in the field" and that Ford disagreed with his decision.

(2) The context of Ford's communication did not reflect a matter of public concern but rather reflected an internal complaint.

The tone and context of Ford's communication was a confrontational questioning of a discretionary decision made by her Agency head. "When a government employee personally confronts his immediate superior, the employing Agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time and place in which it is delivered." *Connick,* 461 U.S. at 153. Even Ford admits that her actions questioned Lawrence's authority.

(3) The form of Ford's speech did not indicate a matter of public concern.

Ford's communication was without foundation and was recklessly made at best. It is more appropriately categorized as the spreading of a false rumor than an effort to raise public consciousness. Assuming even that she was not out to "get" Lawrence, the form of Ford's letter reflected a mindset to recklessly shoot first and ask questions later. Its anonymous form and vague allegations were a smear against which Ford knew Lawrence

would have to try to defend himself, and that form insured discord and disruption within the Agency he led. An element of personal responsibility attaches to an exercise of free speech. Justice Holmes long ago opined that the right does not extend to the right to cry "fire" in a crowded theater. *Gompers v. Buck's Stove and Range, Co.*, 221 U.S. 418, 439 (1911)

Petitioner cites *McIntyre v. Ohio Elections Commissions*, 115 S.Ct. 1511, 1516 (1995) for the proposition that anonymous communications are essentially absolutely protected. However *McIntyre* an elections case, is easily distinguished because it involved constitutionality of a statute which regulated "core political speech", a topic subject to "exacting scrutiny", and such a statute must always be narrowly construed. 115 S. Ct. 1511, at 1519. While noting that the right is broader than politics, this Court indicated that anonymity is generally favored where "literary endeavors" and other communications which cause such works to "enter the marketplace of ideas" are involved. *McIntyre*, 115 S.Ct. at 1516. Such does not describe a workplace complaint.

B. Under the *Pickering* balancing test, the State's interests in promoting the efficiency of the Agency outweigh Ford's interests in communicating as she did.

The *Pickering* balancing test requires a Court to balance the interests of the employee as a citizen in commenting upon matters of public concern and the State's interests as an employer in promoting the efficiency of the public services it performs through its employees.

Pickering, 391 U.S. at 568. In weighing the competing interests, the Court would consider the following factors: (1) whether a close working relationship is essential to the State Agency's public responsibilities; (2) the time, manner, and place of the speech; and (3) the context within which the speech was made. *Ferrara v. Mills, Supra*, at 1512.

(1) A close working relationship is essential for the Board to fulfill its public functions.

Assuming that Ford's letter contained information of limited public concern, such a limited First Amendment interest would not require Lawrence to tolerate behavior which would disrupt the office, undermine his authority, impair efficient operations and harm close working relationships. *Connick*, 461 U.S. at 154. Further, the maintenance of harmony among the Agency's coworkers is taken into consideration. *Pickering*, 391 U.S. at 570. A close working relationship between Ford, the compliance officers in the field, and Lawrence, is necessary for the proper functioning of the Agency. *See id.*

Only five employees, including Ford, worked in the Board's Birmingham office. Exh. 42-39-40. Due to the tenure of most of the office personnel it was also cohesive. Exh. 39-90. Also, much of the Board's work is in compliance administration and enforcement, and Ford was the liaison between the home office and the compliance officers in the field. Exh. 42-112. In order for the Board to enforce the licensing laws, information had to be reported by or to a compliance officer through Ford.

The compliance officers and office staff were upset by the fact that Ford was willing to remain silent as to writing the anonymous letter. When the other compliance officers pointed out to Ford that the wrong person might be disciplined for her letter, Ford said she did not care. Exh. 42-100-103. Exh. 39-86-90. At least one of the compliance officers felt that his trust in Ford had been destroyed. Exh. 42-122. Leonhardi testified that it would have been difficult for him to work with Ford because her behavior had impaired her relationship with the field officers. (*Id.*) Lawrence testified that the rest of the office workers were so upset by the letter that they were unable to do their work. Exh. 39-86. Lawrence also testified that the Agency's work was disrupted and that licensing deficiencies were not corrected during this period. (*id.* at 105.)

(2) The time, manner, and place of Ford's letter further contributed to disruption of the Agency's functions.

The time, manner, and place of the communication can contribute to the disruption of the state Agency's functions. *Morales v. Stierheim*, 848 F.2d 1145, 1150 (11th Cir. 1988). Ford did not choose to express her allegations at a time, manner, and place so as to minimize possible disruptions to the Agency. *See Fikes v. City of Daphne*, 79 F.3d 1079, 1084 (11th Cir. 1996). Instead she recklessly published them. She also does not distinguish the concept of communicating her concerns privately with her employer from that of anonymous letter writing. She in fact chose this form of communication over the right to

communicate privately with her employer. She also did not take advantage of the procedures established under Alabama law which insure that any state employee reporting wrongdoing is protected against retaliation in the workplace (the Alabama State Employees Protection Act), Code of Alabama (1975) 36-26A-1. Availability of such a procedure should be balanced against the need of an employee to send anonymous letters.

Additionally, Ford knew that an accusatory communication sent in an anonymous manner from a misleading location would cause suspicion to fall upon her coworkers in the Agency. Exh. 42-121. Thus, the manner and place selected by Ms. Ford to make her communication knowingly caused suspicion to fall upon her coworkers and brought disruption into the workplace. This suspicion alone caused disruption in the Agency.

(3) The State's interests in ensuring the proper operation of the Agency further outweigh Ford's interests in making the speech.

As she was field liaison, the compliance officers were required to channel office communication through Ford. Exh. 42-112. Leonhardi testified that after Ford expressed willingness to let others take the blame, it would have been difficult for him to rely on her enough to be able to work with her. Exh. 42-122. He also stated that other field officers, including the North Alabama employees being suspected, were required to have the same contact with

her as he. Employees did not want to deal with Ford after it became known she had written the letter. Exh. 39-84.

Interference with work, personnel relationships, or the speaker's job performance can impair the public employee's effectiveness, and avoiding such interference can be a strong state interest. *Rankin*, 483 U.S. 378, 384. The State's interest is "in promoting efficiency of the services it performs through its employees". *Pickering*, 391 U.S. at 563. Pertinent considerations are "whether the statement impairs discipline by supervisors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary or impedes performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. 378, 388, citing *Pickering*, 391 U.S. 570-573. All of the foregoing resulted in this case.

"Government, as an employer, must have wide discretion and control over the management of its personnel and its internal affairs. This includes the prerogative to remove employees where conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony and ultimately impair the efficiency of an office or Agency." *Connick*, 461 U.S. 138, 151. The State's interest to be protected was real and substantial.

2. QUALIFIED IMMUNITY

A. Qualified Immunity shields Lawrence's discretionary action in the discharge of Ford.

As to Ford's individual capacity claim, this Court would be called on to examine whether Lawrence is entitled to qualified immunity. In that analysis, this Court would determine whether Lawrence was acting within his discretionary authority, and whether he violated clearly established law in discharging Ford. The Court of Appeals decision again involved application of a properly stated rule of law and did not conflict with other circuits or a prior decision of this Court.

Lawrence asserted qualified immunity as an affirmative defense to Ford's claim. "Qualified immunity protects government officials performing discretionary functions from civil liability if their conduct does not violate a 'clearly established statutory or constitutional right of which a reasonable person would have known'." *Hansen v. Soldenwagner*, 19 F.3d 573 (11th Cir. 1994). Lawrence would first have to show that he was acting within the scope of his discretionary authority in discharging Ms. Ford. *See Stough v. Gallagher*, 967 F.2d 1523, 1526 (11th Cir. 1992). Once Lawrence met this initial burden, the burden would shift to Ms. Ford to prove that Lawrence's conduct violated clearly established law. *See Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1236 (11th Cir. 1992).

The Examining Board, as a state Agency, must deal with employees in accordance with the rules and regulations of the Alabama State Personnel Board. Personnel

Board regulations classify, prohibit and permit sanctions for "insubordination", "abusive language" and "disruptive conduct". Ford was discharged by Lawrence for these causes in this case. The Board had delegated authority for operational decisions to Lawrence. Exh. 40-23-24. Thus, Lawrence was acting within his discretionary authority as Executive Director in discharging Ms. Ford for violating these regulations.

B. Lawrence's discharge of Ford did not violate clearly established law.

Ford cannot demonstrate that a reasonable government official faced with the same circumstances which faced Lawrence would have had reason to know that her discharge could be a clear violation under 42 U.S.C. §1983. "Government officials are shielded from suit unless the Court is convinced that 'the legal norms allegedly violated by the Defendant were clearly established at the time of the challenged actions or, . . . the law clearly proscribed the actions the Defendant . . . took' ". *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1322 (11th Cir. 1989). Lawrence believed and had no reason to not believe that his actions were lawful in light of clearly established law. *Harris v. Board of Education*, 1997 U.S. App. LEXIS 1202 (11th Cir. Jan. 23, 1997).

Further, an official is also immune from liability if the applicable law is unclear. "Only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated 'clearly established' federal rights. When 'no bright-line standard puts the reasonable public employer on notice

of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where *Pickering* balancing would lead to the inevitable conclusion that the [act taken against] the employee was unlawful." *Hansen*, 19 F.3d at 576. "The qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986).

"For Qualified Immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like situated, reasonable government agent that what the Defendant is doing violates federal law in the circumstances." *Suissa v. Fulton County, GA*, 74 F.3d 266, 270 (11th Cir. 1996). It is clear that Lawrence had no reason to suspect that terminating Ford was or could be a violation of §1983.

CONCLUSION

Based on the above, Lawrence respectfully requests that this Court deny Ford's petition for a writ of certiorari.

Respectfully submitted,

G. Thomas Sullivan
Counsel of Record
Vincent, Hasty, Sullivan,
Elliott & Tidmore, P.C.
2090 Columbiana Road, Suite 4400
Birmingham, Alabama 35216
(205) 979-4490